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No. 84-689

In the Supreme Court of the United States

OCTOBER TERM, 1984

BRUCE POOLAW,
Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK McCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; and FORMER ACTING CITY MANAGERS, BOB WILKERSON and RON MADISON,
Respondents.

RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals applied the proper test in affirming the District Court's finding that plaintiff had failed to satisfy the burden of proof under 42 U.S.C. §2000(e), the Civil Rights Act of 1964.

Whether punitive damages may be assessed against a municipality pursuant to 42 U.S.C. §1981 of the Civil Rights Act of 1866.

Whether the Court of Appeals applied the proper test in determining the assessment of attorney fees to a partially prevailing plaintiff.

PARTIES TO THE PROCEEDINGS

The respondents are the City of Anadarko, the former City Manager, Royce Hunter, the former acting Chief of Police, J. C. Givens and former acting City Managers, Bob Wilkerson and Ron Madison. Clark McCaskill, a named defendant in the court below, was dismissed as a party defendant by plaintiff before the start of trial in the United States District Court for the Western District of Oklahoma.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 738 F.2d 364 and is reprinted as Appendix "A" to the Petition for Writ of Certiorari filed by petitioner herein. A prior opinion of the United States Court of Appeals for the Tenth Circuit in this matter is reported at 660 F.2d 549 and is reprinted as Appendix "B" to petitioner's brief.

There is no formal opinion of the United States District Court for the Western District of Oklahoma. The Journal Entry of Judgment rendered by the United States

District Court for the Western District of Oklahoma incorporating the jury verdict, the court's Order on the respondents' Motion for Judgment Notwithstanding the Verdict and the petitioner's request for attorney fees dated May 27, 1982, is reprinted as Appendix "D" to petitioner's brief.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 27, 1984. The time within which to file a Petition for Writ of Certiorari was extended by Justice Byron White by Order dated September 22, 1984. Petitioner has not stated the statutory provision pursuant to which the jurisdiction of this Court is invoked. Respondents assume petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Respondents assert that the pertinent statutes involved in this matter are 42 U.S.C. § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1983 of the Civil Rights Act of 1871; 42 U.S.C. § 2000(e) of the Civil Rights Act of 1964 and 42 U.S.C. § 1988. The pertinent portions of these statutes are set forth in Appendices "A" through "D" hereof.

STATEMENT OF THE CASE

Petitioner, Bruce Poolaw, is a former police officer with the City of Anadarko Police Department. He filed his complaint in the United States District Court for the Western District of Oklahoma alleging discrimination based upon

his race, American Indian. The action was brought pursuant to 42 U.S.C. §§ 1981, 1983, and 2000(e) of the Civil Rights Acts. The Complaint sought damages in the amount of $600,000 compensatory damages, $400,000 punitive damages, back pay, reinstatement and attorney fees. Poolaw alleged that he was discriminated against on the basis of his race in the terms and condition of his employment as a police officer and that he was unjustifiably terminated and refused reemployment based upon his race.

Poolaw was employed as a police officer in February of 1977 and terminated on January 4, 1978. Mr. Poolaw had had prior law enforcement experience before joining the police force of the City of Anadarko. That experience included a term as a patrolman with the City of Altus police force. He left that position under a cloud, having been suspended from active duty after complaints were filed by citizens of Altus alleging that he was soliciting money from illegal Mexican aliens. (TR 440, 416). During the pendency of the investigation and before the fact finding was complete, Poolaw resigned his position.

During his service with the City of Anadarko police force, Poolaw received a thirty (30) day suspension from duty in November of 1977 when a citizen filed an information with the District Attorney of Caddo County and a warrant was issued for Mr. Poolaw's arrest on a bogus check charge. (TR 169-170). During this same time period, the City Manager and Chief of Police received numerous complaints from citizens with reference to Mr. Poolaw's failure to honor his debts and obligations as they were incurred. (TR 165-168, 356-359).

The City subsequently received information that an additional bogus check incident had occurred and that a warrant for Mr. Poolaw's arrest had been issued in an adjoining county. (TR 434-435). The former Chief of Police testified that he would not have hired Poolaw if he had known of the arrest record. (Tr. 162).

Poolaw was counselled about his financial problems and his actions in driving an unregistered vehicle to and from the police station by the City Manager, Ron Madison. (TR 356-360). His fellow police officers complained to the Chief of Police about Mr. Poolaw taking money from them to purchase jackets which had not been delivered promptly. (TR 360). Considering all factors, it was determined that Mr. Poolaw did not have the requisite character to be a police officer.

Poolaw was informed of his termination from the police force by the then Chief of Police, J. C. Givens, and Assistant Chief, E. M. "Bunk" Salmon. The reasons articulated for his termination were falsification of his employment application regarding his arrest record, past due bills, bogus check complaints and complaints for failure to promptly pay his bills as they were incurred. Pursuant to the Ordinance of the City of Anadarko, Poolaw filed an appeal to the City of Anadarko Policeman Board of Review. (TR 461-462).

After unavoidable delays, two hearings were held on the appeal. At the close of the second hearing, the Board determined that there was insufficient evidence to sustain the decision to terminate the plaintiff. However, the Board neither mandated that Mr. Poolaw be reinstated nor determined what remedy, if any, was appropriate. (TR 122).

Subsequent to Mr. Poolaw's termination, the City of Anadarko employed a new City Manager, Royce Hunter. Mr. Hunter had been the City Manager at the City of Altus during the time that Bruce Poolaw was on the Altus police force. He was fully familiar with the trouble that the City of Altus had encountered with reference to Poolaw's employment as a police officer, including the citizen's complaint. (TR 386).

Based upon the information concerning Poolaw's character and fitness for performance of the duties of a police officer, the decision was made that he failed to meet the minimum requisites necessary for a patrol officer. The decision was based upon his falsification of his employment application, the warrants for his arrest issued in two and possibly three counties, numerous complaints by citizens, his poor driving record, his record as a police officer with the City of Altus, and the complaints by his fellow officers. The decision not to reinstate Poolaw was not based upon any allegation of intoxication.

At approximately the same time, the City of Anadarko also terminated a Caucasian police officer, Bill Weeks. Mr. Weeks' termination was due to one garnishment of his wages. Ron Madison testified that he had made the decision to terminate Mr. Weeks while the City Attorney was unavailable. After being informed that Oklahoma law prohibited termination on the grounds of one garnishment, Mr. Weeks was reinstated under state law, 14A O.S. § 5-106. (TR 335-337). His termination and reinstatement were not based upon his race.

Following his termination, Mr. Poolaw filed a charge of discrimination with the Equal Employment Opportunity Commission and subsequently initiated an action in the United States District Court for the Western District of Oklahoma on July 19, 1979, which complaint was amended on October 1, 1979.

In the original complaint, Poolaw sought punitive damages against all defendants. The City of Anadarko filed a Motion to Strike the request for punitive damages under 42 U.S.C. §§ 1981 and 1983 pursuant to the decision of this Court in the *City of Newport* v. *Facts Concerts, Inc.*, 453 U.S. 247 (1981). On February 1, 1982, the court entered an order granting the City's Motion pursuant to 42 U.S.C. § 1983 but denied the request as to the claims asserted under 42 U.S.C. § 1981. The court noted that the City's Motion to Strike punitive damages under 42 U.S.C. § 1981 would be held in abeyance through the time of trial. The court stated that if punitive damages were awarded by the jury, the court would consider the City's motion as a Motion for Judgment Notwithstanding the Verdict.

The jury returned a verdict findng in favor of the plaintiff, Bruce Poolaw, and against the respondents as set forth in Appendix "C" (p. 27a) of Petitioner's Brief. On April 26, 1982, the City of Anadarko, and defendants, Royce Hunter and Ron Madison, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, moved the court for an Order setting aside the verdict on a variety of grounds. The City of Anadarko also alleged that the award of punitive damages was not authorized against a municipality in an action brought under 42 U.S.C. § 1981. Mr. Hunter asserted that the award of punitive damages against him was

not supported by any evidence of malice, ill will or intent to deprive plaintiff of Constitutional rights. In the alternative, respondents moved for a new trial or a remittitur. Respondents also requested that the court deny the Title VII claim.

The court heard arguments on the Motion for Judgment Notwithstanding the Verdict on May 27, 1982. The court sustained the Motion as a matter of law with reference to the punitive damage award against the City of Anadarko under 42 U.S.C. § 1981 and ordered that the $40,000 punitive damage award be stricken from the verdict. The court overruled the Motion in all other respects. The court also heard the Motion to Deny the Title VII claim under 42 U.S.C. § 2000(e) and found in favor of all of the respondents and against petitioner.

On May 28, 1982, counsel for petitioner put on evidence as to attorney fees and the court found a reasonable attorney fee to be in the amount of $20,000.

ARGUMENTS

I. THE DISTRICT COURT'S FINDINGS UNDER 42 U.S.C. §2000(e) WERE PROPER BASED UPON THE EVIDENCE PRESENTED.

Petitioner pursued his action against the respondents under a variety of statutes. Pursuant to applicable authorities, the case was tried to the jury under 42 U.S.C. §§ 1981 and 1983 and to the trial court as the trier of fact under 42 U.S.C. § 2000(e). *Great American S. & L. Assn.* v. *Novotny,* 442 U.S. 366 (1979). In that capacity, the court found in favor of respondents.

Petitioner asserts that the court erred in its decision that the evidence did not support an award under the Civil Rights Act of 1964. Respondents suggest that the Petitioner's argument evidences a misunderstanding of the District Court's task as well as the task of the Court of Appeals in reviewing the decision of the District Court. On appeal, the scope of review is narrow at best:

> "It is obviously not the function of the appellate court to try the facts or substitute for the trial court in the determination of factual issues. The appellate court does not weigh the evidence presented at trial, but instead only determines its sufficiency to support the findings." *Sabol* v. *Snyder,* 524 F.2d 1009, 1011 (10 Cir. 1975), citing *Southwestern Investment Co.* v. *Cactus Motor Co.,* 355 F.2d 674 (10 Cir. 1966).

The Court of Appeals applied the proper test for a prima facie case articulated by this Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). Respondents presented evidence of a legitimate non-discriminatory reason for the actions taken, *Texas Dept. of Community Affairs*

v. *Burdine*, 450 U.S. 248, 254 (1981). Thus, the presumption dropped from the case and the trial court, as the trier of fact, was in the position to decide the ultimate issue of the case. *Postal Service Board of Governors* v. *Aikens*, ... U.S. ....., 103 S.Ct. 1478 (1983). The District Court determined that Poolaw had failed to establish that the City of Anadarko or the individual respondents were liable under Title VII.

Petitioner presents numerous "facts" to this Court in an apparent attempt to relitigate the facts in issue. Such "facts" are not dispositive. Even where the testimony and the inferences therefrom are conflicting, as is true in almost all litigation, the issue on appeal is whether the trial court's resolution of the facts was clearly erroneous. Absent such a showing, the ultimate findings of facts in Title VII actions should stand. See *Curry* v. *Oklahoma Gas & Elec. Co.*, 730 F.2d 598, 602 (10 Cir. 1984). No showing has been made.

Petitioner also attempts to argue that a random comment by the court with reference to a statement allegedly made by a juror formed the basis of the court's decision as opposed to the court reaching an independent determination. The Court of Appeals specifically found at footnote 3 (Appendix "A", p. 6a) that the District Court had not improperly based his ruling upon a remark made outside the record. The court held:

> "We find it untenable to suppose that the trial judge would disregard four days of testimony and other evidence, admitted through proper channels at trial, in order to be swayed by a juror's extraneous comments."

Petitioner may indeed find it hard to believe that two differing judgments could be rendered upon the same facts.

However, there were two triers of facts and reasonable men may differ. Absence a showing that the trial judge was clearly erroneous in the conclusion he reached upon the evidence, the verdict under 42 U.S.C. § 2000(e) must be sustained.

II. PUNITIVE DAMAGES MAY NOT BE ASSESSED AGAINST A MUNICIPALITY PURSUANT TO 42 U.S.C. §1981.

The principal issue in this case was whether, as a matter of law, punitive damages may be assessed against a municipality pursuant to the provisions of 42 U.S.C. § 1981. The City of Anadarko first raised the issue in its Motion to Strike plaintiff's request for punitive damages. The City asserted that this Court's opinion in *City of Newport* v. *Facts Concerts, Inc., supra,* necessitated a finding that punitive damages may not be assessed against a municipality. The District Court subsequently adopted that position in its order on the defendant's Motion for Judgment Notwithstanding the Verdict. That decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

Respondents have been unable to find any decision by this Court specifically holding that punitive damages may not be awarded under 42 U.S.C. § 1981. However, the majority of lower courts which have addressed the issue subsequent to the Court's opinion in *City of Newport* v. *Facts Concerts, Inc., supra,* have adopted the rationale of that opinion and have expanded it to the provisions of 42 U.S.C. § 1981.

In *City of Newport* v. *Facts Concerts, Inc., supra,* this Court examined the immunity of a municipality from puni-

tive damage awards in accordance with common law, the public policy and purposes served by punitive damages and the legislative intent of Congress. The opinion holds:

> "A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself." *City of Newport* v. *Facts Concerts, Inc.*, 453 U.S. at 267.

This Court concluded that there was no evidence that Congress intended to disturb the settled common law immunity and that no public purpose would be served by allowing an award of punitive damages against a governmental entity under 42 U.S.C. § 1983.

The analysis presented by this Court in the *City of Newport* v. *Facts Concerts, Inc., supra,* decision has been expanded to actions under 42 U.S.C. § 1981. Such an expanded interpretation of this Court's decision does not offend public policy and does not interfere with the advancement of the objectives for which this statute was enacted.

At common law, the liability of a municipality did not extend to an award of punitive damages. This common law immunity continues unless specific statutory intent to abolish the immunity is found within the legislative history of the Act. Petitioner has been unable to direct the Court's attention to any such legislative history of 42 U.S.C. § 1981 which would indicate the intent of Congress to abolish the specific statutory immunity.

It is also useful to bear in mind the purpose for which punitive damages are assessed. A plaintiff is allowed punitive damages as a windfall because society is deemed to benefit from detering malicious or intentional conduct. Such

an award does not compensate for a specific injury but is designed to punish. There is no rationale justifying an award of punitive damages against a municipality since no social benefit is derived therefrom. Petitioner has ignored wholly the statements of this Court concerning whether the public policy to be advanced in awarding punitive damages is served in awarding punitive damages against a municipality. As the Court in *City of Newport* v. *Facts Concerts, Inc., supra* noted:

> "Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. (Citation omitted). Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport* v. *Facts Concerts, Inc.*, 453 U.S. at 267.

The majority of courts which have addressed the issue under 42 U.S.C. § 1981 have held that the rationale expressed above is equally applicable under 42 U.S.C. § 1981. Both the First Circuit and the Tenth Circuit have ruled that punitive damages may not be recovered against a municipality in an action brought under 42 U.S.C. § 1981. In *Heritage Homes, Etc.* v. *Seekonk Water Dist.*, 670 F.2d 1 (1 Cir. 1982), the Court directly faced the question of whether punitive damages should be awarded against a

municipality under 42 U.S.C. § 1981. In rejecting the argument that the immunity under 42 U.S.C. § 1983 does not apply to 42 U.S.C. § 1981, the Court held:

> "In light of *Fact Concerts* we conclude that 'both history and policy' support municipal immunity from punitive damages under § 1981." *Heritage Homes, Etc.* v. *Seekonk Water Dist.*, 670 F.2d at 3.

The First Circuit noted that the plaintiff had been unable to point to any legislative history which would indicate that Congress intended to overturn the common law immunity from punitive damages in enacting 42 U.S.C. § 1981. Petitioner in this action has likewise been unable to make such a demonstration.

In *Poolaw* v. *City of Anadarko, Okla.*, 738 F.2d 364 (10 Cir. 1984), the Court ruled that it was in accord with the result reached by the First Circuit in *Heritage Homes, Etc.* v. *Seekonk Water Dist., supra.* The Court held that the petitioner had failed to persuade the Court by reference to any legislative history or otherwise that Congress intended to override the immunity for punitive damages traditionally enjoyed by a municipality. In addition, the Court found that the policy arguments in favor of municipal immunity are valid as applied to either § 1983 or § 1981 of Title 42. *See also Ferguson* v. *Joliet Mass Transit Dist.*, 526 F.Supp. 222 (N.D. Ill. 1981); *Bell* v. *City of Milwaukee*, 536 F.Supp. 462 (E.D. Wis. 1982); and *Holly* v. *City of Naperville*, 571 F.Supp. 668 (N.D. Ill. 1983).

Respondents suggest that the decision of the District Court and of the Court of Appeals was correct and that a municipality is immune from an award of punitive damages under 42 U.S.C. § 1981.

III. THE ATTORNEY FEE AWARDED WAS APPROPRIATE UNDER THE CIRCUMSTANCES.

Petitioner requests this Court to reverse the lower court's award apparently asserting that the award which petitioner characterizes as unrealistic, unfair and dismally low results in a denial of his equal protection rights. Respondents assert that the fee was more than adequate in view of the fact that the plaintiff was, at best, only partially prevailing and in view of the applicaton of the appropriate tests for determining the reasonableness of fee awards.

The District Court for the Western District of Oklahoma held an evidentiary hearing and allowed counsel for plaintiff to present evidence and expert testimony concerning the appropriate fee to be awarded in view of the work performed and the results obtained. The Court, upon careful consideration of the evidence as applied to the elements to be considered, found that an attorney fee in the amount of $20,000 was appropriate.

Subsequent to the District Court's findings, this Court provided additional guidance on the question of the appropriate factors to be considered in an award of attorney fees under 42 U.S.C. § 1988. In *Hensley* v. *Eckerhart,* ..... U.S. ....., 76 L.Ed.2d 40 (1983), this Court addressed the extent to which the plaintiff's success is a factor in determining the proper amount of attorney fees to be awarded.

In reaching its decision, this Court traced the legislative history of the Act and concluded that it did not provide a definitive answer as to the proper standards for setting fee awards where plaintiff had achieved only limited success. The Court held:

> "If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. . . . Again, the most critical factor is the degree of success obtained." 76 L.Ed.2d at 52.

The decision in *Hensley* v. *Eckerhart, supra* noted that the fee applicant bears the burden of establishing entitlement to an award by documenting the appropriate hours expended and the hourly rate. This Court specifically concluded that counsel should maintain billing time records in a manner which will enable a reviewing Court to identify distinct claims. In addition, this Court reemphasized its position that the District Court has discretion in determining the appropriateness of an award since the District Court has superior understanding of the litigation.

The United States Court of Appeals for the Tenth Circuit had the benefit of this Court's ruling in *Hensley* v. *Eckerhart, supra,* when it examined and affirmed the lower court's award of a $20,000 attorney fee. In applying that decision to the facts of this case, it is clear that the plaintiff was, at best, only partially prevailing. He was wholly unsuccessful as to any respondent on his claims under 42 U.S.C. § 2000(e). Similarly, he was unsuccessful in his claims under 42 U.S.C. § 1981, as to the individual respondents. In addition, his claims under 42 U.S.C. § 1983 were only partially successful with only a $1.00 nominal damage award under the equal protection claim and $3.00 actual damages under the due process claims.

In addition, the Court of Appeals had the benefit of its own opinion, *Ramos* v. *Lamm*, 713 F.2d 546 (10 Cir. 1983) issued subsequent to this Court's opinion in *Hensley* v. *Eckerhart, supra.* In *Ramos* v. *Lamm, supra*, the Court noted that the first step in calculating fees is to determine the number of hours reasonably spent by counsel. The Court held that in the future, all lawyers would be required to keep "meticulous, contemporaneous time records" if they intend to seek fees under 42 U.S.C. § 1988. In this case, it is beyond dispute that counsel for plaintiff failed to keep such time records. In addition, the necessity for contemporaneous time records had long been a requirement of attorneys practicing in the State of Oklahoma. The Oklahoma Supreme Court had mandated that attorneys who seek fee awards were required to present detailed time records to the Court. *State ex rel. Burk* v. *City of Oklahoma City*, 598 P.2d 659 (Okl. 1979).

The evidence presented by counsel for petitioner indicated that the documentary evidence was neither meticulous nor contemporaneous. Mr. Miskovsky testified that his hours were a summation prepared the night before the hearing by referring to pleadings in the file and a review of docket sheets. (Motion Transcript, p. 6). Clearly, such records are inaccurate and cannot provide the necessary basis for determining the reasonableness of the time spent. The District Court carefully scrutinized the records as was its duty and found that the hours represented by counsel in the summation were greatly exaggerated. The trial court properly exercised its vigilance in reducing needlessly high and unsupported claims for hours expended.

The Court of Appeals in *Ramos* v. *Lamm, supra* also indicated that a District Court should examine how the hours claimed were allotted to specific tasks. The District Court in this case did perform such an analysis.

In addition, co-counsel for the petitioner in the case claimed approximately 386 hours. Again, these records were, in part, incomplete and showed an approximation as opposed to contemporaneous time records. In addition, the record summaries showed a duplication of effort. The trial court is entitled to discount attorney fees where it is evident that a duplication of services has occurred. *Taylor* v. *Sterrett,* 640 F.2d 663 (5 Cir. 1981); *Ramos* v. *Lamm,* 713 F.2d at 554.

At the evidentiary hearing, petitioner also presented testimony of two practicing attorneys in an attempt to substantiate the fee request. Neither attorney was familiar with the issues in the case. The trial court on the other hand, was very familiar with the issues presented in the case and properly considered the same in the award rendered.

Petitioner outlines twelve elements which he contends are the ultimate guidelines in determining a reasonable fee. The Court of Appeals was fully conversant with those elements when it rendered its opinion in *Ramos* v. *Lamm, supra.* The District Court considered the elements as appropriate. The time and labor required was determined by the Court with a specific holding that the time claimed on the reconstructed time records was grossly exaggerated. The expert witnesses were unable to testify as to the novelty or difficulty of the issues since they were wholly unfamiliar with the same. The trial court was also acquainted

with the customary fees awarded in that district. As this Court has held, the reasonableness of a fee is to be calculated according to the prevailing market rate in the relevant community and not according to the cost of providing the specific legal services involved. *Blum* v. *Stenson*, 52 Law Week 4377 (Mar. 21, 1984).

The petitioner also argues that the Court should consider the amount and results obtained, the experience and competency of counsel and the desirability of the case in determining the appropriateness of an award. The Court of Appeals in *Ramos* v. *Lamm, supra*, noted that Civil Rights cases now comprise a large part of all federal litigation and that no stigma remains associated with the defense of these cases. Counsel representing a client in a Civil Rights case is no longer a lone voice crying in the wilderness.

As to the results obtained and the skill involved in reaching those results, the District Court, which was in the best position to evaluate counsel, concluded that counsel had failed to comply with numerous orders of the Court, had engaged in objections to evidence favorable to his own client, and had exercised improper courtroom decorum in violation of the local rules of practice. In addition, the Court noted the disproportionate ratio between the requested fee of $121,000 and the actual results obtained of a verdict of $11,004.

Based upon these findings, the trial court properly determined that the requested award was unreasonable. It is the responsibility of the trial court, which has seen the attorney's work at first hand and is familiar with the case and prevailing rates in the area to determine the fee. The

exercise of that discretion should not be upset, absent of finding of clear abuse. *Gurule* v. *Wilson*, 635 F.2d 782 (10 Cir. 1980); *Higgins* v. *State of Okl. ex rel. Okl. Emp. Sec.*, 642 F.2d 1199 (10 Cir. 1981). There is no evidence of abuse of that discretion in this case.

CONCLUSION

The respondents herein respectfully assert that the decision of the United States Court of Appeals for the Tenth Circuit is proper in all respects, and request that the Court decline to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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November, 1984

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this ..... day of November, 1984, three copies of the foregoing Response Brief in Opposition to the Petition for Writ of Certiorari were deposited in the United States Post Office with first-class postage prepaid thereon, addressed to counsel of record, Grover Miskovsky, 5801 N. Broadway Extension, Suite 101, Oklahoma City, Oklahoma 73118.

Counsel further certifies that all parties required to be served have been served.

John Joseph Snider

APPENDIX "A"

The provisions of 42 U.S.C. § 1981 are as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

APPENDIX "B"

The pertinent provisions of 42 U.S.C. § 1983 are as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX "C"

The pertinent provision of 42 U.S.C. § 1988 is as follows:

> "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the revised statutes [42 U.S.C. §§ 1981-1983, 1985, 1986] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

APPENDIX "D"

The pertinent provisions of 42 U.S.C. § 2000e-2(a) are as follows:

"a. *EMPLOYERS*. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; . . ."